

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :
WOOD, : Docket #1:20-cv-02489-
 : LTS-GWG
 :
Plaintiff, :
 :
- against - :
 :
MIKE BLOOMBERG 2020, INC., et al., : New York, New York
 : December 2, 2022
Defendants. :
 :
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PROCEEDINGS BEFORE
THE HONORABLE GABRIEL W. GORENSTEIN,
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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INDEXE X A M I N A T I O N S

<u>Witness</u>	<u>Direct</u>	<u>Cross</u>	<u>Re- Direct</u>	<u>Re- Cross</u>
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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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PROCEEDINGS

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THE CLERK: This is the matter of Wood v. Mike Bloomberg 2020 Inc., et al., case number 20cv2489. Starting with plaintiff's counsel, please state your appearance for the record.

MS. HANNAH COLE-CHU: Good morning, Your Honor, this is Hannah Cole-Chu for the plaintiffs. I'm an attorney at Outten & Golden.

MS. ALISE BLOOM: Good morning, Your Honor, this is Alise Bloom for the defendant. I'm joined by my colleague Noa Baddish, and we're both at Proskauer Rose.

THE COURT: Okay, hold on a second.

(pause in proceeding)

THE COURT: All right, we're today based on two letters, docket 308 and 310. I've read the letters. I'll give each side a moment or two to add anything they want to add. If I have any questions, I'll ask you. So we'll start with Ms. Cole-Chu.

MS. COLE-CHU: Thank you, Your Honor, good morning. Both subpoenas are improper, and I have some points I'd like to make on both. So beginning with the Van Ryan (phonetic) subpoena, there are no documents that the Van Ryan subpoena can produce, or that Van Ryan can produce in response to the subpoena that could shed any light on the issues that Bloomberg says it needs the

PROCEEDINGS

4

documents for. Bloomberg says there are two main reasons. The reason Ms. Wheatley stepped back as class representative in the fall of 2020, and her reason she stepped forward again in the fall of 2022, and this is why it needs documents from Van Ryan to shed light on that decision process. Ms. Wheatley made her decision to step back as class representative in fall of 2020 but she did not begin her employment until May of 2021. So there are no, there's nothing that the subpoena, that documents responsive to a subpoena can do to illuminate anything about her decision to step back as class representative at that time.

And with respect to her decision to resume her role again as class representative in the fall of 2022, the testimony in her deposition makes clear that her employment at Van Ryan had no bearing on that decision. And so there's nothing that, there are no documents that her current employer can provide that would give any information on that decision-making process, and her decisions for participating in the class, participating in the lawsuit of the class representatives are not relevant in any way to any merits issue or her adequacy to serve as class representative.

The campaign is attempting to link that

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2 decision when it actually got clear testimony in the
3 deposition that there is no link. You know, she
4 initially said that it was her job at Van Ryan that led
5 her to step back, and then Bloomberg introduced an
6 exhibit that clarified the timeline, refreshed her
7 recollection, and she candidly acknowledged that she was
8 mistaken that at the start of her employment was not the
9 reason she stepped back.

10 So given the overly broad nature of the
11 request, the privacy interests, the reputational risks
12 associated with subpoenaing her current employer, the
13 subpoena is improper. And I'll just, I'll also note,
14 you know, that on the adequacy point, you know, there's
15 nothing that goes to adequacy here. The inquiry hinges
16 on whether she knows what her claims are and this is,
17 you know, according to the case law cited by the
18 campaign, she knows what the claims are, she understands
19 she represents the interests of the class, she
20 communicates regularly with class counsel, she
21 participates in the prosecution of the case. Now her
22 reasons for participating are not relevant in any way.

23 And, you know, to zoom out a little bit just
24 for context, the parties have been actively engaged in
25 discovery for several months. We've produced 14 of our

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2 clients for depositions in the past month on a very
3 aggressive and totally unexplained timeline set by
4 Bloomberg. The parties have actually had a number of
5 discovery disputes, and we've worked to resolve them.
6 Plaintiffs have actually conceded on a number of issues
7 in order to avoid bringing them to the Court.

8 And Your Honor hasn't actually heard from us on
9 many discovery disputes in this matter, and we're really
10 pleased that we've been successful at avoiding court
11 intervention on many of these issues. But this one is
12 really important, and that's why we're here today. Ms.
13 Wheatley is a class representative who is standing up
14 for other people, and she's sacrificing her time,
15 energy, and it hasn't been easy, you know, in addition
16 to all of the normal standard responsibilities,
17 participating in discovery, giving discovery responses.
18 You know, the campaign insisted on starting her
19 deposition at 7 in the morning Pacific time. They're
20 now subpoenaing her current and former employers.
21 They're trying to bring her back for a deposition later
22 this month which we oppose, which we will oppose.

23 And, you know, this is a, this is a simple,
24 straightforward wage and hour case where the plaintiffs
25 worked for the employer for less than three months, all

PROCEEDINGS

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the field organizers did the same thing, they all worked overtime, none of them were paid for it. This is a straightforward and, frankly, settleable misclassification case. So this subpoena seeking information that puts Ms. Wheatley in a spotlight of her employer when she has not worked there very long and puts a burden on them to provide documents. They'll know that she's a litigant, it is harassing, overly burdensome, and it's for nothing. There's nothing that these documents can show.

So that's on Van Ryan. The subpoena's improper. You know, the Court should issue an order for protection preventing the service of the subpoena.

On Genex we consent to a subpoena served on Genex limited to documents reflecting the hours that Ms. Wheatley worked for Genex which should be sufficient to address all of Bloomberg's concerns. In its letter Bloomberg makes a number of arguments on why documents beyond those reflecting hours are relevant and important, and all of those arguments are wrong. They say that personnel file and performance records are likely to have relevant information, and I'll just go through the list. The fact that there were changes to her job duties between the time she worked for Genex

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PROCEEDINGS

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before the campaign and her time at the campaign, not relevant to any merits issue.

And I guess I'll pause and say, you know, like the issues in the case are the job duties of organizers and hours that they worked. And so the fact that there were changes in her job duties at another job are not relevant to anything. The fact that there are changes to her schedule also not relevant to the hours that she worked for the campaign, the job duties she worked for the campaign. Her job performance at Genex, and even if she was supposed to be available, are also not relevant to the fact that she worked for the campaign.

I think the key point there, Your Honor, is that she testifies - if you look at exhibit H of Bloomberg's submission on pages 193 and 194, she testifies that even though she was on call, she didn't get calls. She said it did not really occur. And so she gave this testimony that she was working for the campaign, the hours that she was working, what she was doing. And so this issue doesn't impact liability or damages.

And even if she was paid, even if she was paid for the time, that has no bearing on the hours that, the work that she was performing as intern. You know the

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PROCEEDINGS

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definition of work (indiscernible) Section 23 of the FLSA is very broad to suffer or permit, you know, she was performing this work for the campaign. And so any documents beyond that, documents related to job performance, discipline, her application, her full personnel file, anything related to compensation, none of that has an bearing on any issues in the case, and also has nothing to do with her adequacy as a class representative which concerns those considerations that I was mentioning before.

I can pause there, and if you have any questions, Your Honor, I'm happy to address them.

THE COURT: I don't at this time. Ms. Bloom.

MS. BLOOM: Thank you, Your Honor. This is Ms. Bloom for the defendants. Let me start with Genex and just for some context, Ms. Wheatley-Diaz is the sole or the sole person that filed a PAGA letter, and, therefore, she will be, if she's, if approved, she'll be the sole PAGA plaintiff in this case. I mean she has a very, very critical role. She's also been now back in the case or proposed as a representative for the California class.

I want to talk about the Genex subpoena first. The Genex subpoena was very limited in time, and why we

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PROCEEDINGS

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need those records is because Ms. Wheatley-Diaz was pretty clear that she worked remotely for Genex and that she was simultaneously working for Genex and the campaign. So to the extent that, and you heard my adversary say this is an overtime case, so the number of hours that this witness puts in for the campaign is something that bears directly on the question of whether or not, assuming that we don't prevail on the exemption, whether or not she is entitled to overtime. The fact that she was simultaneously working another job bears directly on the question of how many hours a day she was working for the campaign.

And the reason why just getting her hours is not sufficient is because, as you heard my adversary say, you know, she testified that her job at Genex was to be available. If there's a performance review that says Ms. Wheatley-Diaz during this time period is an excellent employee, she's always available, she fields calls all the time, that is another factor that's going to go into whether she was simultaneously working for two employers at the same time, and that goes directly to the question of how many hours did she put in for the campaign and whether or not she put in any hours that would meet the threshold for overtime.

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PROCEEDINGS

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So --

THE COURT: So your assumption is that whatever documents you get on hours will not show times when she was available and working for, I'm sorry, working for Genex?

MS. BLOOM: That's one piece of it. The other piece of it is that she at her deposition she said she rarely got a phone call. So to the extent that the house overlap, like let's say the time record - I don't even know if the time records would say she clocked in at 9 and she was out at 12 or whether they'd say she worked five hours, I have no idea because I haven't seen them. But I think the hours will be one thing because that potentially shows the overlap, but in order to evaluate whether or not, like how much effort she was actually spending on her job for Genex versus her job for the campaign if she's there, if she's working for both at the same time, I think we are entitled to see if, for example, there's a performance review that says she's great or that says she's terrible at that.

I mean that's a really, really critical issue, and it goes to the overtime piece, but, frankly, it also goes to her adequacy as a class representative. If at the end of the day she's simultaneously working for two

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PROCEEDINGS

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companies, she's simultaneously being by two companies, and she's actually not performing her full efforts for either company during the same number of hours but yet being paid for those hours, that we submit is something that would bear directly not only on her overtime claim but also on the adequacy point. And this is a former employer, we are more than willing to have these records be, you know, marked confidential, be subject to a confidentiality order.

We're not trying to harass Ms. Wheatley-Diaz. She's a critical witness in this case. She has come in and out of this case, and that's another reason why the Genex records are relevant. She was in the case, and then she said she didn't want to be in the case, and then she wants to be back in the case.

You know, one of the key things about a class representative is also your availability to participate, and that's where the Genex records and the Van Ryan records overlap. Because she - at her deposition, and you've seen the testimony, initially when I asked her why was it that she stepped back and then she said because I think because of her job, job duties and responsibilities, and then why did you come back in, because I knew that, because it seemed like I could do

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PROCEEDINGS

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it, and there was some confusion as to whether - like when she said that she stepped back because she started a new job, her testimony was more specific than that. It was that I didn't know what my job duties would be and anticipate, you know, I didn't know what my responsibilities would be.

So at this point I'm not even, we're not even clear as to whether is she right about Van Ryan, is she not right about Van Ryan, her current employer, in terms of the timing. How does Genex fit into that? But the bigger point is this is someone who obviously had a concern about her job responsibilities and whether those job responsibilities would impact her ability to participate in this case as a class representative. She records from Genex and then records from her current employer would show - and she testified also that her job duties have increased over time. So for a class rep who says something that impacted my decision to step out and then step back in was my work commitment, we're entitled to know whether or not her work commitment has increased or decreased over time. That goes directly, directly to her ability to serve as a class representative.

And I might feel differently if she had been in

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2 this case the whole time and we never had this
3 collateral issue, but we do have this collateral issue,
4 and given the collateral issue I think that we are
5 entitled to the discovery from Genex. And with regard
6 to the discover from Van Ryan, I think we're entitled to
7 know what her work commitment is and whether or not it
8 was the job or not the job. And I understand there's
9 some confusion in her testimony, but I think we're
10 entitled to sort that out.

11 And I suggested to my adversary that we would
12 be willing to do this via employment authorization. It
13 doesn't have to be by a subpoena. Something that would,
14 that doesn't make it, make her seem like a litigant
15 willing to explore any alternatives. But I would just
16 add that this is a case that when they filed this case,
17 it got a tremendous amount of publicity that was
18 generated by the plaintiffs. Now, I don't know if it
19 was the Wood plaintiff or the Sklar plaintiffs, but
20 there was a big effort on social media, and I do know
21 Wheatley-Diaz participated in some social media on this
22 case. So, you know, to suggest that nobody knows about
23 it I think is probably not borne out by the facts.

24 The last thing I'll say, and I mention this
25 just because my adversary did, we have worked very

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PROCEEDINGS

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collaboratively on discovery. It has been a two-way street. I mean obviously the burden on us in terms of ESI is a lot greater than on them, and we have produced, we have quickly produced all the ESI. We made sure they had all the ESI for any witness that they wanted to depose two weeks before the deposition. And any time they've asked us for a witness, we've immediately gotten back to them with dates. We recently have a scheduling issue with one witness, but we've produced whoever they wanted, and we produced their ESI two weeks in advance so that they could prepare.

So for all of those reasons we would ask that you allow the Genex subpoena to go forward, and with regard to Van Ryan's we believe that the subpoena's appropriate and that we're entitled to the information. But to the extent there's a concern, that you authorize us to do it via an employment authorization or some other means that would be less intrusive.

MS. COLE-CHU: Your Honor, if I may respond?

THE COURT: All right, anything else from plaintiff that you haven't already said?

MS. COLE-CHU: Sure, I just want to make a couple of notes. You know, Ms. Bloom was discussing, said that availability to participate goes to adequacy,

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PROCEEDINGS

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but I don't, it is now in the way that she's describing. It is not availability to participate. It is the actual participation in the case. You know, there's not going to be - to my knowledge there's no authority where the Court conducted any inquiry into outside obligations of class representatives when assessing their adequacy to serve as class representatives. The inquiry is simply have they participated in the case and do they affirmatively state that they can participate in the case, and Ms. Wheatley has done that. And the period where she was not involved in the case, what the period when the case was in effect stayed during the pendency of the motion to dismiss. So, you know, again, the decision whether to step out and step back in is not going to be part of the adequacy analysis.

On the employment authorization point, you know, I'm not sure whether Ms. Bloom was addressing the Genex subpoena or the Van Ryan subpoena, but they did not offer that as a option for the Genex subpoena because they served the subpoena prior to conferring with us, they offered employment authorization as an option for the Van Ryan subpoena which, you know, as we, as I'm explaining, totally baseless. So we're not going to agree to employment authorization.

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PROCEEDINGS

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And, you know, on the PAGA, as Your Honor knows, plaintiffs Coker and (indiscernible) filed timely PAGA notices. That's an issue that's currently before the Court. Ms. Wheatley is not the only California representative who timely filed a PAGA notice.

THE COURT: You're done, Ms. Cole-Chu?

MS. COLE-CHU: Yes.

THE COURT: Okay.

MS. COLE-CHU: Thank you, Your Honor.

THE COURT: All right, so I've heard from both sides. I'm prepared to make my ruling. With respect to Genex I don't see any relevance other than documents reflecting the hours that Ms. Wheatley worked for Genex. I mean this issue that she had some independent obligation to be available, even if there was a, you know, former evaluation that says she's always available when needed would not answer the question of what hours she was devoting.

My assumption is that when someone's available and gets called on, that gets reflected in whatever documents they're going to have as to when she was paid and how. Usually when people are available to do work and they do the work, they get paid for it. I suppose if after you get the records on the hours, you know,

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PROCEEDINGS

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there's someone suggestion in there that there are hours that are worked that are somehow uncompensated and not reflecting those hours, I suppose the defendants could come back to me, but it would have to be pretty strong evidence.

So at this point there should be communication to Genex that says the subpoena is limited to only records reflecting hours, and obviously you should make every effort to not be burdensome with Genex. We don't need every document that reflects hours. If they have some computer database that can print out or generate a list of hours for Ms. Wheatley, that's all you're going to need. But you can certainly talk to Genex about what's available, again, as long as it's limited to hours worked. Again, none of the issues, compensation or anything else to me has any relevance.

No relevance to anything in Van Ryan's possession, so that subpoena is not to be served. I agree with plaintiffs with what matters here is for purpose of service of the class representative is whether you have a conflict and whether you're ready to participate as a class representative, it's understandable and common for class representatives who have full-time demanding jobs in other areas, people sue

1 PROCEEDINGS 19

2 all the time in that situation. That's why they hire
3 lawyers to deal with the time-consuming work of
4 conducting the litigation.

5 The requirement to be able to prosecute the
6 action are intended to a requirement that is, precludes
7 someone who has one or more or even two jobs from
8 serving in that role. So I don't see any relevance
9 about work commitments to Van Ryan or anything else
10 that's going on at Van Ryan.

11 That's my rulings. I'm not hearing any
12 argument, but if there's any questions about the ruling,
13 I'm happy to answer them. Any questions from the
14 plaintiff's side?

15 MS. COLE-CHU: No, Your Honor, thank you.

16 THE COURT: How about from defendants?

17 MS. BLOOM: No, Your Honor, thank you.

18 THE COURT: Okay. Do I need to deal with time
19 periods or as long as I'm limited to hours, there was
20 agreement on that. It just occurred to me. I didn't
21 remember if there was some dispute on that.

22 MS. COLE-CHU: Your Honor, there is. The
23 scope of the subpoena on Genex is entirely too broad,
24 and what we have requested is that the subpoena be
25 limited to only the weeks that she worked for the

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PROCEEDINGS

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campaign. You know, any evidence of hours beyond that time (indiscernible) relevant.

THE COURT: Okay, and I'm trying to remember the defendant's position on that once I'm limiting it the way I did.

MS. BLOOM: This is the defendant. We'd ask for December 2019 which would be right before she started working for the campaign through October of 2020 when I think, when she - I'm sorry, I just lost my train of thought - when she first switched through as a class representative. And we would ask that we not - we would ask that we be given some leeway to get at least the hour worked for the period before and a little bit after the time that she working for the campaign because to the extent that her hours, I mean she's also said that her hours went down. That, again, that's going to be, we think, an important piece that goes to, an important piece about this whole overtime claim. If she's working the same hours and we're only asking for a month before, and we would limit it to a month after, but if she's working the same hours, I mean that's going to be a really important piece of the whole overtime claim and whether or not she was actually getting double paid by two companies.

1 PROCEEDINGS

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2 THE COURT: Just try it one more time because
3 I honestly don't understand it. If the theory of my
4 ruling is that you need to find out how much she was
5 working somewhere else, because it would bear upon
6 whether she was physically capable of doing the hours
7 she claimed to be doing at Bloomberg, what does it
8 matter what she did the weeks before or after she was
9 working at Bloomberg? Try it one more time. How does
10 it go to that issue?

11 MS. BLOOM: It doesn't go to the issue that
12 you just articulated.

13 THE COURT: Okay. It goes to an issue about
14 her ability to serve as class representative, is that
15 what it was?

16 MS. BLOOM: Yeah, I mean the point is she
17 testified - if you start with the fact that this is an
18 overtime case and she testified that she worked less
19 hours at Genex during the time that she was working for
20 the campaign but that she simultaneously worked for both
21 companies, and I know we've been through this, and that
22 --

23 THE COURT: Maybe it's a, I think it's a
24 credibility thing. I think you'd want to see if it's
25 really true that she worked less hours. While normally

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PROCEEDINGS

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I don't allow discovery on credibility, I think in this narrow instance I'm willing to give you the month before she started at Bloomberg to see --

MS. BLOOM: And the month after?

THE COURT: -- if there was a change - I don't see how the month after is relevant. To see if there was, in fact, there was a change in hours once she started working at Bloomberg. So you can get a month before. All right, thank you, everyone. Anything else from plaintiffs?

MS. COLE-CHU: No, Your Honor, thank you.

THE COURT: From defendant?

MS. BLOOM: Thank you.

THE COURT: Okay, thank you, everyone, good bye.

(Whereupon, the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the case of Wood v. Mike Bloomberg 2020, Inc., Docket #20-cv-02489-LTS-GWG, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Carole Ludwig

Carole Ludwig

Date: December 5, 2022